

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SEVENTH REGION

UNIVERSITY PARK LIVING CENTER

Employer

and

CASE GR-7-RC-21477

LOCAL 79, SERVICE EMPLOYEES
INTERNATIONAL UNION, AFL-CIO

Petitioner

Thomas Barnes, and Rachel Urquhart, Attorneys, of Grand Rapids, Michigan, for the Employer.

Angela Williams, Attorney, and Jordan Kramer, of Detroit, Michigan, for the Petitioner.

SUPPLEMENTAL DECISION ON REMAND

On January 7, 1999, Petitioner filed a petition to represent a unit consisting of full-time and regular part-time unit managers, (registered nurses and licensed practical nurses) employed by the Employer at its Muskegon, Michigan facility.¹ On February 19, 1999, the Regional Director issued a Decision and Direction of Election in this matter and the Board denied the Employer's request for review on March 18, 1999. After the election, a Certification of Representative issued upon a majority of the unit managers voting to be represented for collective-bargaining purposes by the Petitioner.

On May 29, 1999, the Board issued its decision at 328 NLRB 1172 which found that the Employer had violated Section 8(a)(5) and (1) of the National Labor Relations Act by refusing the Petitioner's request to bargain following its certification.

¹ The Employer was previously owned by Mercy Health Services, which has merged with Holy Cross to form Trinity Health. The Employer is now part of the Trinity Continuing Care Services Division of Trinity Health.

Subsequently, the Supreme Court issued its decision in *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 121 S. Ct. 1861 (2001), and on August 3, 2001, the Board informed the parties that it had decided, sua sponte, to reconsider its decision in this proceeding. In response, the General Counsel and the Employer moved to vacate the Board's previous decision and vacate the certification. On October 24, 2001, the Board issued a Supplemental Decision and Order remanding this case to the Regional Director for further consideration and to adduce "additional evidence on the issue of whether the Employer's registered nurses and licensed practical nurses [unit managers] 'assign' and 'responsibly direct' other employees and on the scope or degree of 'independent judgment' used in the exercise of such authority."² The Board declined to vacate the certification of the Petitioner. The hearing was reopened on November 28, 2001, and the parties filed briefs, which were carefully considered.

In addition to Director of Nursing Beatrice Long-Koolovitz, the Employer has two clinical care supervisory coordinator (CCC) positions. A CCC's primary duty is to keep nursing care plans up to date and thereby ensure that proper medical procedures are performed for residents consistent with changes in a resident's condition. In addition, CCCs submit required patient care data to the state of Michigan and also act as a resource for other staff members for resident care issues.

Between 60 and 70 competency evaluated nursing assistants (CENAs) are currently employed at the facility. The number of CENAs on a shift varies depending on the number of residents in the facility. From August until October 2001, there were eight CENAs on the day shift (6:00 a.m.-2:30 p.m.), and between five and six CENAs on both the afternoon (2 p.m. - 10:30 p.m.) and midnight shifts (10 p.m. to 6:30 a.m.).

The duties of the CENAs are listed in a job description that is provided by the Employer's corporate office. The job description states that CENAs provide personal hygiene to residents including bathing, providing oral skin and nail care, completing resident grooming, assisting with resident toilet needs, making beds, performing and assisting with resident mobility, using appropriate techniques while lifting and transferring residents, using aseptic techniques for infection control, documenting all care given, maintaining confidentiality, reporting to nurses for written and verbal assignments, serving resident meals, maintaining

² Although the Board's remand was specifically reserved to the issue of whether the unit managers responsibly direct the work of nurses aides, and the degree of independent judgment required in connection to that direction, the record in the instant matter is replete with evidence on the ostensible authority of unit managers to hire, suspend, lay off, discharge, discipline, and adjust the grievances of the aides. Both parties also presented evidence of secondary indicia of supervisory status. Considering the specificity of the Board Order, such evidence is not considered in this decision to the extent it does not relate to the issues of assignment and direction of employees.

nursing unit in a clean and orderly manner, attending in-unit nursing staff meetings, assisting other staff members, and abiding by nursing department policies, practices and standards of care.³

CENAs learn how to perform their tasks in training to achieve state certification, in new hire orientation provided by the Employer, and in the 12 hours of continuing education required each year for them to maintain their certification. To the degree that there is slight variation between facilities on how to achieve state standards, the CCCs make the determinations as to the proper method for CENAs to perform their tasks.

There are currently 15 RN and LPN unit managers who are at issue in this proceeding. The Employer maintains its position that unit managers possess the authority of supervisors as defined in Section 2(11) of the Act. During a typical workday, three unit managers are assigned to the day shift, three unit managers are assigned to the afternoon shift, and two unit managers are assigned to the midnight shift.

The Employer maintains a nursing care manual from the corporate office that contains all of the facility's policies and procedures that pertain to the care of residents and protocols as to actual physical care. Clinical specialists visit the various facilities and use their observations and feedback from employees at the facilities, including unit managers, to develop the protocols and policies contained in the manual. The record is relatively silent as to the degree to which CENAs or unit managers consult the nursing care manual, although one unit manager testified that she did not know where the manual was kept.

The Employer's corporate headquarters generates a unit manager "accountability form" that predetermines at least some of the unit managers' tasks on a daily basis. A completed accountability form is provided by the outgoing unit manager on a shift to the unit manager whose shift is beginning. This form, in addition to other evidence, demonstrates that unit managers perform a variety of patient care functions, including passing medications, counting narcotics, maintaining records on the disbursal of psychoactive drugs, transcribing physician orders, completing residence rounds, completing unplanned occurrence reports and infection control logs, as well as performing treatments on residents. Unit managers spend at least seven out of eight hours undertaking such functions. They

³ In addition there is a restorative aide at the facility, Charlene McGuffey, who has more technical skills and training than CENAS, but there is no separate state certification for restorative aides. She works closely with residents who have special difficulties with matters such as swallowing. On occasion, McGuffey works shifts strictly as a CENA if the Employer is short-staffed

perform these functions on their own and do not direct other employees to complete them.

The accountability form also refers to tasks that unit managers must ensure have been completed, but that they do not necessarily complete themselves. The unit manager must verify the completion of documentation concerning the CENA's performance of certain tasks such as resident skin monitoring, baths, bowel and bladder monitoring, weighing of residents, food acceptance, and incident reports. Unit managers verify that these tasks have been completed by looking at residents' records. With regard to skin monitoring, for example, the CENA is to place the documentation that he or she completed in a three ring binder, and the unit manager confirms that the task has been done by looking at the binder. If the CENA has not completed the appropriate form, it is the responsibility of the unit manager to make inquiries of the CENA as to whether the task was done. With regard to the completion of incident reports, if a unit manager is aware that a resident has engaged in behavior that can jeopardize another resident, or if a resident resists care, the unit manager must ensure that an incident report has been completed by appropriate witnesses. The unit managers spend about half an hour at the end of their shifts to ensure CENAs complete the required documentation.

Unit Manager and Infection Control Nurse Janeen Dillon, who served as the assistant director of nursing until 1999, testified that in addition to ensuring the CENA's completion of the requisite forms, unit managers help and educate the CENAs in their actual performance of resident "activities of daily living," such as baths, toilet use, feedings, and other matters.⁴ Dillon provides direction to CENAs approximately 15 times a day with regard to these tasks.

While the CENAs' job duties are found in their job descriptions, the unit managers make adjustments to their duties. For example, if a resident needs their fingernails to be cut or needs to be shaved, a unit manager can direct a CENA to do so at a particular time. The unit managers specify which vital signs are to be taken at a given time or which residents are to be given showers on a particular day. In addition, the unit manager watches CENAs performing their duties and sometimes assists the CENA in tasks. The unit manager can request that CENAs assist them or another CENA in the performance of a particular task. However, CENAs can also request other CENAs to assist them in such tasks. The restorative aide makes daily requests for assistance from the CENAs in tasks such as weighing the resident, helping a resident to stand up, feeding a resident, or

⁴ The Employer requests that an adverse inference be taken from the Petitioner's failure to call a unit manager to testify. However, representation hearings are investigatory and nonadversarial in nature. NLRB Case Handling Manual, Part Two, Representation Hearing, Section 11181. In such circumstances, adverse inferences are not appropriate.

having a CENA follow her with a wheelchair while she accompanies a resident who is attempting to walk.

In addition to directing CENAs as to when to perform certain resident care functions, unit managers assign which CENAs are to assist in the dining room, provide meal service to residents in their bed, wash wheelchairs, maintain resident units, and clean the ice machine or containers on a given day. The unit manager writes these tasks down on an assignment sheet and gives it to the CENA at the beginning of a shift.

At the end of their shifts, departing CENAs gather to make sure that there will be coverage for the next shift which might require them to stay at the facility an additional four hours. Outgoing unit managers report on the status of residents to incoming unit managers.

The Employer's nurse scheduler, Angie Carillo, who is not a unit manager, creates a master schedule for the assignment of unit managers and CENAs. CENAs are scheduled the same days each week on a rotating basis in a continuous, ongoing, and repetitive manner. No one but the scheduler can set or change the master schedule except human resources or the director of nursing in situations when, for example, a CENA takes a personal day. The scheduler also completes a daily assignment sheet that is called the floor plan. This is a list of all the residents at the facility with their locations. The scheduler leaves a space by the resident names to be filled in by the unit managers to assign CENAs to particular residents. The unit manager's responsibility is to "match" the master schedule to the floor plan by assigning more experienced CENAs to residents who are acutely ill, difficult, in respiratory isolation, unable to feed themselves, or require an IV. In addition, in making assignments the unit manager must consider whether a CENA has been ill or sustained an injury that imposes a work restriction. A CENA with restrictions, for example, will not be assigned to engage in the heavy lifting that is required with some residents. In a similar vein, in order to avoid the abuse of residents, a highly stressed CENA will not be assigned to a difficult resident. DON Long-Koolovitz is sometimes involved in this assignment process only because her office is located next to the nursing station or when she has left specific instructions about a situation that she is monitoring. Also, CCCs can occasionally be involved in assignments. However, as a practical matter, the facility's longstanding policy had been that it is better for residents to have the same person taking care of them on a daily basis. Thus, even relatively new CENAs are assigned to the same residents again and again. Typically, unit managers need only "plug in" new employees to slots left vacant from employee turnover, absences, or unforeseen circumstances. There are "normal" halls for particular CENAs, and they are typically assigned to the same area each day. If a CENA scheduled for duty fell ill, the unit manager does assign his or her work to

the remaining CENAs. According to the current collective bargaining agreement in effect between the Petitioner and the Employer covering CENAs, in the event the Employer determines the need to reassign CENAs, it does so by seniority and job classification, on a rotating basis.

Staffing levels are, in part, mandated by the State of Michigan. The minimum guidelines require 2.25 staff hours per patient per 24 hour day (PPD). The Employer strives to maintain a higher level of 3.0 PPD, although only the minimum staffing level is maintained if unscheduled employees would have to work overtime. If the facility is understaffed because of absences, the unit managers are responsible to follow the provisions of the collective bargaining agreement and offer voluntary overtime by seniority. If there are insufficient volunteers to solve understaffing, unit managers may, based on seniority, mandate employees to work beyond their scheduled shifts. Unit managers fill out documentation acknowledging when a CENA works overtime. Conversely, if the PPD climbs above 3, the facility is deemed overstaffed and the unit managers can send CENAs home, starting at the bottom of the seniority list. Unit managers confer with each other to determine if the facility is overstaffed, and how it should be handled.

The record is in conflict as to who has the authority to adjust staff ratios. According to DON Beatrice Long-Koolovitz, the unit manager has the authority to adjust the ratio between the state minimum 2.25 PPD and the Employer's preferred 3.0 PPD level in some limited circumstances, for example, if there are many acute patients who would require additional care. Unit Manager Dillon testified that she adjusted this ratio one or two times a week and that the level is determined by unit managers conferring at the beginning and end of the shifts. If a consensus cannot be reached, the most senior unit manager decides the appointed PPD.

In contrast, the Petitioner's witness, Restorative Aide Charleen McGuffey, testified that the administrator established staffing levels rather than the unit manager. According to McGuffey these numbers are posted on a clipboard or in a schedule book, and the administrator's protocol provides how many CENAs are required per number of residents.

Unit managers can recommend or require that CENAs attend additional training or in-servicing if they are lacking skill in some aspect of their positions. Such training or in-servicing is in addition to regular training, mandatory monthly general staff meetings, and yearly in-service education. However, the record is devoid of specific examples of a unit manager requiring CENAs to attend additional training.

Unit managers attend general staff meetings and professional meetings with the DON and CCCs. Some staffing issues with regard to the assignments of CENAs are discussed at these meetings. Unit managers do not attend the daily management meeting held by the CCCs, the social worker, the scheduler, the admissions coordinator, the DON, and the environmental service directors.

On May 29, 2001, in *Kentucky River, supra* the Supreme Court upheld the Board's longstanding rule that the burden of proving Section 2(11) supervisory status rests with the party asserting it. See *Ohio Masonic Home*, 295 NLRB 390, 393 fn.7 (1989); *Bowen of Houston, Inc.*, 280 NLRB 1222, 1223 (1986). However, the Court rejected the Board's interpretation of "independent judgment" in Section 2(11)'s test for supervisory status, i.e., that registered nurses will not be deemed to have used "independent judgment" when they exercise "ordinary professional or technical judgment in directing less-skilled employees to deliver services in accordance with employer-specified standards." 121 S.Ct. at 1863. Although the Court found the Board's interpretation of "independent judgment" in this respect to be inconsistent with the Act, it recognized that it is within the Board's discretion to determine, within reason, what scope or degree of "independent judgment" meets the statutory threshold. See *Beverly Health & Rehabilitation Services*, 335 NLRB No. 54 (Aug. 27, 2001).

The Employer contends that the Supreme Courts decision in *Kentucky River* means that supervisory status cannot be undermined by the existence of established policies and procedures governing the conduct of employees. To the contrary, the Court agreed with the Board in that the term "independent judgment" is ambiguous as to the *degree* of discretion required for supervisory status and that such degree of judgment "that might ordinarily be required to conduct a particular task may be reduced below the statutory threshold by detailed orders and regulations issued by the employer." 121 S.Ct. at 1867. In discussing the tension in the Act between the Section 2(11) definition of supervisors and the Section 2(12) definition of professionals, the Court also left open the question of the interpretation of the Section 2(11) supervisory function of "responsible direction," noting the possibility of "distinguishing employees who direct the manner of others' performance of discrete tasks from employees who direct other employees." 121 S.Ct. at 1871. See *Majestic Star Casino*, 335 NLRB No. 36 (Aug. 27, 2001).

The Employer introduced documents such as job descriptions and related testimony to show that unit managers responsibly direct CENAs and utilize independent judgment. However much of this was conclusionary and unsupported by evidence of specific authority. *Chevron U.S.A., Inc.*, 309 NLRB 59, 61 (1991); *Sears Roebuck & Co*, 304 NLRB 193 (1991).

With regard to the unit managers' ability to adjust staffing ratios, the weight of the evidence shows that the staffing ratios are derived from levels set by State law, corporate policy, the administrator, and the director of nursing. Similarly, with regard to the assignment of CENAs to care for particular residents, the weight of the evidence establishes that CENAs care for basically the same residents over long periods of time. The unit manager reassigns CENAs only to fill gaps that arise due to absences or employee turnover. The Employer asserts that this requires independent judgment in matching the level of experience of the CENA with the acuity of the residents. However, the procedure is explicitly governed by the collective bargaining agreement and based on seniority. Direction as to a specific and discrete task and even the assignment of employees detailing where they are to carry out their duties falls below the supervisory threshold if the use of independent judgment and discretion is circumscribed by the superior's standing orders and the employer's operating regulations. *Dynamic Science, Inc.*, 334 NLRB No. 56 (June 27, 2001); *Chevron Shipping Co.*, 317 NLRB 379, 381 (1995).

Concerning the unit managers' direction of CENAs to perform particular tasks at a certain time, i.e., shaving residents, showering, and the other activities of daily living, the CENA assignments themselves are derived from their job description and from the CCC's care plans for the residents. The evidence establishes that the unit managers do not have the authority to determine whether a patient should be shaved or showered, but only when that task should be accomplished. Similarly, tasks such as washing wheelchairs, feeding residents at dinner, and cleaning ice buckets are tasks that are preordained by the Employer's protocols. The unit manager may assign a particular CENA to wash wheelchairs one shift and assign another CENA this task the next day, but their limited authority in assigning such discrete tasks does not require the use of independent judgment in the direction of other employees. *Ferguson Electric Co.*, 335 NLRB No. 15 (Aug. 24, 2001). Likewise, the unit nurses' daily verification that CENAs have performed their required tasks is routine.

The Employer cites *North Dade Hospital*, 210 NLRB 588, 592 (1974), where the Board found that "team supervisors" were statutory supervisors because they had the authority to assign LPNs and aides to specific rooms and designate the proper nursing care to be provided by those employees to the patients in those rooms. In the instant matter, however, the Employer designates the proper nursing care through corporate-generated checklists and other protocols generated by the CCCs, and the unit managers' responsibilities are limited to ensuring that the CENAs complete the tasks that have been predesignated by the Employer.

Inasmuch as I have found that unit managers do not exercise independent judgment in their direction of the work of the CENAs in this proceeding, I

reaffirm our previous conclusion that the petitioned-for unit managers are not statutory supervisors.

Dated at Detroit, Michigan, this 27th day of December, 2001

(SEAL)

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